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## A CRITIQUE OF THE NEW 2009 ARBITRATION LAW OF LAGOS STATE

Dr Emilia Onyema\*

### Introduction

In 2005 a committee was constituted to review the arbitration law in Nigeria. This committee produced a draft federal arbitration and conciliation bill and a draft uniform state arbitration and conciliation bill for states.<sup>1</sup> The Lagos State House of Assembly became the first state of the Federation to adopt the draft uniform arbitration and conciliation bill and promulgated the Lagos State Arbitration Law (LSAL) which was signed by the Executive Governor of the state and became effective on 18 March 2009. It is the committee's expectation that other states in the Federation will promulgate laws in similar terms on arbitration. In addition to this state of affairs there has been a recent surge and promotion of various alternative means of resolving disputes in Nigeria. These include the spread of multi-door court houses and the numerous arbitration associations, conferences and workshops on the subject in Nigeria.<sup>2</sup> It is these that make a critique of this law necessary.

It is useful to state at the outset that Nigeria is a federation composed of a federal government with clearly defined powers and jurisdiction, a Federal Capital Territory and thirty-six constituent states of which Lagos is one.<sup>3</sup> As a federation operating a federal constitution, the jurisdictional and legislative (both substantive and territorial) remit of these constituent parts are clearly defined in the Constitution.<sup>4</sup> In this capacity the National Assembly enacted the ACA 'to provide a unified legal framework for ... settlement of commercial disputes by arbitration ...', and to make applicable the New York Convention to any award made in Nigeria or any Contracting State arising out of international commercial arbitration.<sup>5</sup> Clearly the ACA applies to domestic arbitration (Part I), international arbitration (Parts I and III) and New York Convention awards (s 54). The ACA therefore governs any international arbitration, with seat in any part of

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<sup>1</sup> This is the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria set up by Chief Bayo Ojo, SAN, then Attorney General and Minister of Justice, on 23 September 2005. The Committee produced a Report and went into abeyance until recently when a new committee was inaugurated to consolidate the various reports on the revision of the laws on arbitration in the country.

<sup>2</sup> The surge is particularly more pronounced in alternative dispute resolution mechanisms such as mediation.

<sup>3</sup> See s 2(2) Constitution of the Federal Republic of Nigeria 1999 available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> accessed on 24 August 2010.

<sup>4</sup> See s 4 1999 Constitution which refers to the Second Schedule containing both the Exclusive and Concurrent legislative lists.

<sup>5</sup> As stated in the Preamble to the ACA. Note that the New York Convention here refers to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 ratified by Nigeria on 15 June 1970.

the Federation and this invariably includes where the seat of such arbitral reference is in Lagos State, in addition to domestic arbitrations.

This article critically examines the scope of the LSAL, its provisions which are consistent with part I of the Arbitration and Conciliation Act 1988<sup>6</sup> (ACA) and those that are novel to statutes on arbitration in Nigeria. This article is divided into three sections analysing the relationship between the LSAL and the ACA (1), those provisions of the LSAL which are consistent with the ACA (2), the new provisions of the LSAL (3) and a conclusion.

### 1. LSAL and ACA

The Lagos State legislator clearly stated the general principles underpinning the new law and so to be taken into account in its interpretation. The general principles in section 1 (a) and (b) are copied verbatim from sections 1(a) and (b) of the English Arbitration Act 1996<sup>7</sup> (EAA) while sections 1(c) and (d) restate the binding nature of the arbitration agreement and the need for all those involved in arbitration to do all that is necessary for the proper and expeditious conduct of arbitral proceedings. On the remit of the LSAL, it states that it applies to *all* arbitration within Lagos State from 18 May 2009 (as law of the seat of arbitration, the *lex loci arbitri*) except where parties have expressly opted out of its application by choosing another arbitration law to apply.<sup>8</sup> The first obvious concern raised by this provision is its breadth. It appears to purport to apply to international arbitration references with seat in Lagos state. This raises a fundamental jurisdictional question of which law such international references will be subject to as the law of the seat of arbitration. So where there is a foreign element (for example one of the parties to the dispute is foreign) in the arbitral reference, and the parties had chosen Lagos as the seat of arbitration, will the ACA or LSAL apply as the *lex loci arbitri*? This is the question answered in this section.

Examples of provisions where the Lagos State Legislator appears to provide for situations affecting international arbitration in the new law abound. This has created confusion in this area. These examples can be found in section 2 on parties agreeing another arbitration law to apply.<sup>9</sup> The same section 2 gives the parties the right to opt out of the LSAL by an express choice of another arbitration law to govern the reference. The emphasis here is on the *arbitration law*. It is suggested that as this provision refers to the *law* applicable to the arbitral procedure it must be a reference to the choice of the *arbitration law* of another state of the Federation (and not that of a foreign State). In addition to this clarification, a functional interpretation of this section is needed to allow the parties choose a set of arbitration rules to govern the dispute subject to the mandatory provisions and gap filling role of the LSAL.<sup>10</sup> For the avoidance of doubt the

<sup>6</sup> The ACA makes provisions on arbitration and conciliation. This article only examines the sections on arbitration and more particularly in Part I which deals with domestic arbitration.

<sup>7</sup> It should be observed that the EAA is the arbitration law of England, Wales and Northern Ireland according to s 2 EAA. For purposes of this critique, it should be noted that the EAA applies to a unitary legal regime while Lagos state is a constituent part of Nigeria as a federal state.

<sup>8</sup> See s 2 LSAL which is a very flexible regime giving the parties the option to subject their arbitral reference to another law. Such law must remain subject to the mandatory provisions of the LSAL when read in conjunction with s 1(b) LSAL.

<sup>9</sup> The same interpretation will be given to s 5(3) LSAL which refers to 'any law'.

<sup>10</sup> This is so since arbitration rules are not synonymous with or equivalent to arbitration laws.

LSAL expressly empowers the disputing parties to choose any set of arbitration rules to govern their dispute. However in the absence of such choice the arbitration rules of the Lagos Court of Arbitration shall govern the arbitral reference.<sup>11</sup> This section recognises the right of disputing parties to choose the arbitration rules of their choice to govern their reference unlike the ACA which requires parties to apply the arbitration rules scheduled to it thereby limiting party choice in this regard.<sup>12</sup> Clearly, the choice of another arbitration law or arbitration rules will be limited by the mandatory provisions of the LSAL.

Other examples are section 20(3) on applying the law determined by the conflict of law rules which the arbitrator considers applicable, sections 55(2)(ii) and 57(2)(b) on validity of the arbitration agreement under the law chosen by the parties, references to the law of the country where the award was made in section 57(2)(b), or the arbitration took place in section 57(2)(g), suspension of the award in the country it was made in section 57(2)(h). The question that these provisions raise is whether Lagos State can legislate on matters implicating another sovereign state. It is the Federal Government of Nigeria that is given the competence to so legislate which it has done in the ACA. To further support this view on the reach of the LSAL is the fact that the draft uniform arbitration and conciliation bill on which it was based is expressly drafted to provide for domestic arbitrations only.

Under the LSAL the Lagos High Court has exclusive jurisdiction over matters arising<sup>13</sup> while for matters arising under the ACA, 'the High Court of a State, the High Court of the Federal Capital territory, Abuja or the Federal High Court' all have concurrent jurisdiction.<sup>14</sup> So, if the Lagos High Court also has jurisdiction to entertain matters arising under the ACA the relevant question for disputants will be determining under which law to proceed or which law will apply to their application where the seat is in Lagos State. Section 60(b) LSAL indicates a possible solution since it expressly subjects itself to 'any other Law by virtue of which certain disputes may be submitted to arbitration only in accordance with the provisions of that or another Law'. It is therefore submitted that where the arbitration is purely domestic, parties can choose to apply either under part I of the ACA or the LSAL but where there is an international element to the reference, the ACA will apply to the exclusion of the LSAL.<sup>15</sup> The Lagos High Court will apply the ACA to international arbitrations and the LSAL to domestic arbitrations.

The LSAL expressly limits the powers of the Lagos High Court to intervene in any arbitration subject to it.<sup>16</sup> This court plays primarily a supporting role to arbitration. In addition to other powers discussed below, the court is empowered to grant interim

<sup>11</sup> See s 31(1) LSAL. The Lagos Court of Arbitration when commissioned will be a state run arbitration institution, enacted into law by the Lagos Court of Arbitration Law 2009.

<sup>12</sup> See s 15 ACA and First Schedule to the ACA which states that, 'these Rules shall govern any arbitration proceedings ...'.

<sup>13</sup> See s 61(1) LSAL. Note the references to the 'Lagos Court of Arbitration' (for example as appointing authority) in the LSAL are to a statutory body which acts as an arbitration institution.

<sup>14</sup> See s 57(1) ACA.

<sup>15</sup> This law will be the Federal Arbitration and Conciliation Act when the bill is adopted.

<sup>16</sup> See s 59 LSAL. See also rule 1 Arbitration Application Rules Scheduled to the LSAL for a helpful list of applications that can be made to the Court.



measures to any party involved in arbitration subject to the LSAL,<sup>17</sup> and issue writs of *sub poena ad testificandum* or *duces tecum* (basically to summon a witness to give oral evidence or testimony or to produce documents). The order of the court will be for the witness to appear before the arbitral tribunal itself (and not the court) to give his or her evidence. The natural limitation to this is that the person to be compelled is in Nigeria.<sup>18</sup>

## 2. Provisions consistent with ACA

Most of the provisions of the LSAL on the arbitration agreement (2.1), appointment, challenge and replacement of arbitrators (2.2), the arbitral process (2.3), award and grounds for setting it aside (2.4) and termination of the proceedings (2.5) are consistent with and in some instances contain more detailed provisions which bring much needed clarification and certainty to the law than the ACA. The issues discussed in this section show no substantial inconsistency between the two laws.

### 2.1 Arbitration agreement

The provisions of the LSAL apply to both arbitration clauses and submission agreements.<sup>19</sup> It retains the requirement for an arbitration agreement to be in writing with a robust and modern definition of writing.<sup>20</sup> It also clarifies various situations that would lead to the invalidation of an arbitration agreement.<sup>21</sup> The LSAL expressly requires courts in Lagos state to stay proceedings where ‘an action is brought in a matter subject to an Arbitration Agreement’ on the request of a party made before submission of the first statement on the substance of the dispute.<sup>22</sup> This provision leaves out from the purview of ‘taking steps in the proceedings’, procedural steps such as applications for summary judgment or extension of time.<sup>23</sup> Thus a party can request an anti-suit injunction in favour of a valid arbitration agreement at any time before it files a defence to the claim. Another point to note here is that the court is required to stay action and not reject jurisdiction so that effectively this is a question of a non-suit and not termination of the proceedings.<sup>24</sup> This is a very important clarification since being statutory courts are bound by it and parties who in the face of arbitration agreements raise all sorts of tactical objections will no longer exploit any previous loophole. The courts in Lagos state will need to give a purposive interpretation to this provision to ensure that the desire of parties to settle their dispute through arbitration is honoured.

### 2.2 Appointment, challenge and replacement of arbitrators.

The LSAL empowers the disputing parties to agree the number of arbitrators with the default being a sole arbitrator.<sup>25</sup> The default of a sole arbitrator takes the cost and time

<sup>17</sup> See s 21(1) LSAL.

<sup>18</sup> See s 43 LSAL and s 23 ACA.

<sup>19</sup> See s 3(2) LSAL and s 12(2) ACA which is more detailed and explicit.

<sup>20</sup> See s 3(3)–(8) LSAL. Since the LSAL is a domestic law as clarified above, this definition of writing is not impacted by the definition of writing under art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

<sup>21</sup> The LSAL clearly recognises that an arbitration agreement is a contract and so the provisions in ss 4 & 5 are atypical of this recognition.

<sup>22</sup> See s 6(1) LSAL and s 5(1) ACA.

<sup>23</sup> The English courts recently in, *Bilta (UK) Ltd (in liquidation) v Nazir & Others* [2010] EWHC 1086 (Ch); [2010] WLR (D) 129, held that an application for extension of time under s 9 EAA did not amount to taking steps in the proceedings.

<sup>24</sup> S 5(1) ACA also refers to a stay of proceedings.

<sup>25</sup> See s 7 LSAL and s 6 ACA where the default is three arbitrators.

implications of a three-person tribunal into consideration. This is particularly laudable for small and medium sized businesses wishing to arbitrate their commercial disputes. The standard methods for appointing arbitrators are retained in the LSAL with the Lagos Court of Arbitration given the task to act as an appointing authority.<sup>26</sup> These methods are joint appointment of a sole arbitrator by the parties or appointment by an appointing authority from a list provided by the parties.<sup>27</sup> In a three member arbitral tribunal, each party will be required to appoint one arbitrator and the two party appointees will then appoint the third and presiding arbitrator.<sup>28</sup> In default, the appointing authority will assist with the appointment.<sup>29</sup> One new point to note on the appointment of arbitrators is the empowerment of the appointing authority to appoint the arbitrator nominated by one party to act as a sole arbitrator where the parties fail to agree on the sole arbitrator.<sup>30</sup>

The LSAL also makes detailed provisions for the appointment and role of an umpire<sup>31</sup> and for multiparty arbitrations,<sup>32</sup> both of which are not mentioned in the ACA. In multiparty references, there are usually more than two parties so that allowing each party to nominate one arbitrator mean there will possibly be more than three arbitrators forming the arbitral tribunal. This has implications for not just costs of the reference but also time and decision-making. The LSAL adopts the general practice in such situations which is to allow the parties to group themselves into claimants and respondents as their interests permit and then each group will appoint one arbitrator each with the third appointed by the two co-arbitrators. If this is not possible or practicable, the LSAL provides for the appointing authority to appoint the arbitrators.

A party can challenge an arbitrator whether or not nominated by him on several grounds. These are where he can show that (1), 'circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence', (2) the arbitrator does not possess any agreed qualifications, (3) the arbitrator lacks or there is doubt that he possesses the capacity (physical and mental) to conduct the proceedings, and (4) where the applicant has suffered substantial injustice as a result of the arbitrator's failure to use reasonable despatch in the conduct of the proceedings or in making the award.<sup>33</sup> The first ground is accepted in most jurisdictions and is also found in the UNCITRAL Model Law on International Commercial Arbitration 1985, amended 2006 (Model Law).<sup>34</sup>

<sup>26</sup> See for example s 7 ACA and Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract*, Routledge and Cavendish, 2010 at pp 84-102.

<sup>27</sup> See generally s 8(3) (a) LSAL.

<sup>28</sup> See generally, s 8(4) (a) LSAL.

<sup>29</sup> See s 8 LSAL. Note that under part I of the ACA the relevant High Court will make the appointment while in part III (for international references) the appointing authority will assist.

<sup>30</sup> See s 8(3) (b) LSAL. This requirement is slightly different from s 17 EAA which empowers the arbitrator so nominated to act as the sole arbitrator. There is no requirement in the EAA for an appointing authority to confirm the nomination and appoint him as arbitrator. See B. Harris, R. Planterose and J. Tecks, *The Arbitration Act 1996: a Commentary*, 4<sup>th</sup> ed., Blackwell Publ, 2010 at pp 97-100.

<sup>31</sup> See s 9 LSAL. The ACA does not make any provisions on umpires.

<sup>32</sup> See s 8(2) LSAL. The ACA does not make any provisions on multiparty situations.

<sup>33</sup> See s 10(3) LSAL. Note that the ACA contains only three grounds in s 8(3) on justifiable doubts as to his impartiality or independence and lack of agreed qualifications.

<sup>34</sup> See art 13 Model Law and art 12 UNCITRAL Arbitration Rules 2010 as examples.

The second ground is predicated on provisions in the LSAL on the qualifications of the arbitrator in sections 8(3) (h) and (j). The combined effect of these sections is to elevate the agreement between the parties on the qualifications to be possessed by any arbitrator appointee to the level of a condition (or fundamental term) of the contract between the arbitrator and the parties. It is important to highlight this provision of the LSAL since generally speaking a person does not need to possess any specific qualification (academic, professional or otherwise) to act as an arbitrator. There is no law in Nigeria (or particularly in Lagos state) to that effect so that such qualification will need to have been agreed by the parties before the appointment of the arbitrator. It appears that where the parties are silent as to the qualifications the arbitrator should possess, anybody can still be appointed arbitrator by the parties in Lagos state.

The third ground is an interesting one referring to physical and mental capacity of the arbitrator. This can be a complex issue especially as the law does not provide any guidance but clearly implicates questions of fact. The alternative limb which is where there is justifiable doubt as to the arbitrator's physical or mental capacity may impact on some cultural issues. For example, at what point does 'justifiable doubt' as to a person's physical or mental capacity arise? How would such doubt be established? It is obvious that this provision will not minimise judicial interference but create opportunities for ingenious lawyers to delay the proceedings. Ground four compliments one of the general principles of the LSAL, to pursue the arbitration without unnecessary delay or expense.<sup>35</sup> To assist the arbitrator (where some delay may be necessary) and forestall frivolous applications, the LSAL provides a safety net that such delay must cause the applicant substantial injustice.

Where a party wishes to challenge the arbitrator, all disputing parties can agree the procedure to adopt and where they have not, the LSAL makes default provisions. The challenging party has fifteen days from the time he becomes aware of the circumstances substantiating the ground(s) for challenge to make the challenge.<sup>36</sup> Fifteen days is an incredibly short time for a party to decide whether the information in its possession (1) is enough to substantiate a ground for challenge; and (2) whether to challenge or not. Several factors need to be taken into account simply because this is a challenge of the person (or one of those) who will decide the dispute. It is clear that the success or failure of the challenge will depend to a great extent on the validity and provability of the information or data relied upon in making the challenge. The fact that avoiding unnecessary delay is one of the overriding objectives of the LSAL may be seen as a justification for this provision.

The applicant will make the challenge in writing to the arbitral tribunal and send copies of this to the other parties in the dispute.<sup>37</sup> The reasons for the challenge must be contained in this written statement. The arbitral tribunal or the arbitral institution nominated as appointing authority will decide the challenge. The LSAL is silent on challenge under institutional arbitration, presumably because institutions usually

<sup>35</sup> See s 34 and s 1(a) LSAL.

<sup>36</sup> See s 11 LSAL and s 9 ACA which also provides for fifteen days.

<sup>37</sup> In accordance with s 11(3) & (4) LSAL, the challenged arbitrator can withdraw or where the other party agrees to the challenge, then he would have to withdraw since this is a firm termination of his mandate and contract for service.

provide for the decision maker in their arbitration rules.<sup>38</sup> It is obvious that in a three member arbitral tribunal, where one arbitrator is challenged, the remaining two arbitrators should decide the challenge. The absence of the challenged arbitrator on the panel is on the basis of the fundamental legal principle that no man can be a judge in his own cause. But this conclusion is not obvious from section 11(5) LSAL especially where there is no appointing authority. The applicant in that situation will request the Lagos High Court to make the decision.<sup>39</sup> This is supported by section 12(2) LSAL which provides for the court to decide arbitral challenge where, 'the applicant has first exhausted any available recourse to that *institution or person*' (emphasis added). This obviously refers to the appointing authority and not the arbitral tribunal itself. Where the parties have designated an appointing authority (whether arbitral institution or another) then clearly that authority will make the decision. The LSAL anticipates that the parties will nominate an appointing authority to exercise the powers allocated to it under the law, and in default of such appointment, the Lagos Court of Arbitration will act. This analysis will also apply where the arbitral tribunal is constituted by a sole arbitrator.

A different section deals with a disputing party's right to seek removal of an arbitrator before the court on slightly dissimilar grounds. Grounds 1, 3 and 4 are in the same terms. Ground 2 is where the arbitrator does not possess the qualification 'required by the arbitration agreement'.<sup>40</sup> It is submitted that 'agreed by the parties' is wider than 'required by the arbitration agreement'. Disputing parties can agree several issues (within their powers under the *lex arbitri*) after the dispute arises and arbitration commences. Such matters may not necessarily have been agreed in the arbitration agreement. For example, rarely will parties detail the academic (or professional) qualification to be possessed by the arbitrator in the arbitration agreement but can expressly or by implication agree this issue after commencing the reference while in the process of appointing the arbitrator. The direct effect of this change of words in section 12 is to make subsection (1) (b) an additional ground for challenging an arbitrator before the courts. It must be noted that where parties provide for a particular qualification to be possessed by the arbitrator in the arbitration agreement and they subsequently change their minds (expressly, impliedly or by conduct) during the process of appointing the arbitrator, this will amount to an amendment of the terms of the arbitration agreement which effectively means the new requirements as agreed between the parties supersedes the requirement expressed in the arbitration agreement.

The LSAL clarifies that any pre-agreed arbitrator-challenge decision maker will have to make the decision before the applicant approaches the Lagos High Court.<sup>41</sup> While the court proceeding is pending the arbitral tribunal can continue with the arbitral reference so that this is not frustrated by the challenge application. A new requirement in this regard is for the arbitrator (to be removed) to appear before the court to defend himself.

<sup>38</sup> In most institutions, the principal administrative organ of the institution will make such decisions. See for example art 15.1 the Lagos Regional Centre Arbitration Rules 2008 where the Centre (its Director General) makes the decision.

<sup>39</sup> This is on the basis of s 12 LSAL.

<sup>40</sup> Remember that s 10(3) (b) LSAL provides, 'the arbitrator does not possess the qualifications agreed by the parties'.

<sup>41</sup> See s 12(2) LSAL. Note that the ACA in s 9(2) mandates the arbitral tribunal to make the decision so that the discussion on the challenge of a sole arbitrator will also affect the ACA.

It is difficult to reconcile this 'right' given to the arbitrator with arbitral jurisprudence on this issue. Usually the court application will not be against the challenged arbitrator but filed against the other party to the dispute, though the allegations are made against the arbitrator. This new provision at first glance, appears to correct the 'anomaly' of getting the other party to the arbitration to 'answer' the allegation against the arbitrator. At best, this is a right given to the arbitrator in the LSAL which he will be at liberty to exercise at his discretion. However the provision leaves the door open to a party to request the court to summon the arbitrator to answer to the allegations. This is not attractive especially because the arbitrator is not party to the dispute and so should not descend into the arena of conflict. Moreover if the arbitrator feels strongly about the allegation against him before the court, s/he can always make representations to the court (as an interested third party). This is even without the statutory provision. In the event of the loss of one or more arbitrators, substitute arbitrators will be appointed.<sup>42</sup>

Section 16 LSAL provides that where an arbitrator ceases to hold office (by challenge, termination, resignation or death), the parties can agree on the effect (if any) such cessation of office 'may have on *any* appointment made by the arbitrator (alone or jointly)'.<sup>43</sup> On reading this section, one situation that immediately comes to mind is its effect on the appointment of the presiding arbitrator where in a panel of arbitrators, a successfully challenged co-arbitrator (for example) had joined in the appointment of the presiding arbitrator (who was not challenged). Section 16(2)(b) LSAL in answer, expressly excludes this situation.<sup>44</sup> Note however that the section refers to *any appointment* made by such arbitrator. This may therefore affect the appointment of the tribunal secretary where he or she was appointed by the challenged arbitrator or a tribunal appointed expert witness.<sup>45</sup> This provision gives the section a wider effect than is recognised in arbitral law and practice.

On the consequence of a truncated tribunal, section 16(2) LSAL provides that where the parties have not made any agreement (on the effect of the cessation of the office of the arbitrator), the arbitral tribunal shall be reconstituted and then decide whether to repeat or continue any prior hearings. Thus where the arbitral tribunal is truncated, the default provision is for a substitute arbitrator to be appointed. The parties can agree otherwise.<sup>46</sup> It appears from reading sections 16 and 17 together that a truncated tribunal must be reconstituted in order for it to proceed with the reference unless the parties agree otherwise. It is important disputing parties are aware of this provision so they ensure they either choose arbitration rules that allow the truncated tribunal to proceed in its truncated form (if necessary) or make express provisions to this effect.<sup>47</sup>

<sup>42</sup> See s 17 LSAL and s 11 ACA which refers to appointing a substitute arbitrator on the termination of the mandate of one of the arbitrators.

<sup>43</sup> See s 16 LSAL (emphasis added). Note that this section does not include removal of the arbitrator under s 12 LSAL.

<sup>44</sup> This recognises the theory that each arbitrator concludes a separate contract with the parties when he accepts appointment. So that if for whatever reason (successful challenge, termination, resignation or death) his contract comes to an end, this will only affect that particular arbitrator and not the other members of the tribunal. See Emilia Onyema (2010) at pp 76-83.

<sup>45</sup> See Emilia Onyema, 'The Role of the International Arbitral Tribunal Secretary', 9 VJ (2005) pp 99-110.

<sup>46</sup> See s 17 LSAL.

<sup>47</sup> See the wording of art 14 of the Arbitration Rules scheduled to the ACA.



### 2.3 Arbitral process

The disputing parties can agree when the arbitral reference will commence. In the absence of any agreement arbitral proceedings will be deemed to commence on the date the request for arbitration is delivered to the respondent party.<sup>48</sup> Parties must keep a record of the delivery date along with evidence of effective service or delivery. This is especially important as being the deemed date of commencement of the arbitral reference, this date will affect limitation periods for commencing an action.

The LSAL empowers the arbitrator to determine his jurisdiction including the existence or validity of the arbitration agreement.<sup>49</sup> It is trite that the power of the arbitrator emanates from the arbitration agreement. Practically every modern law on arbitration expressly empowers the arbitrator to determine his jurisdiction which includes the existence and validity of the arbitration agreement (doctrine of competence-competence).<sup>50</sup>

The LSAL also clarifies the period in the arbitral reference when a party can raise the issue of challenge to the jurisdiction of the tribunal.<sup>51</sup> It is important to note that where this objection is not raised in a timely manner, the arbitral tribunal can, 'admit a later plea if it considers that the delay is justified'.<sup>52</sup> A party contesting the jurisdiction of the arbitral tribunal can raise the challenge at any time prior to submitting the points of dispute. The choice of the words 'points of dispute' in this section may be confusing. It is suggested that where a list of issues in dispute are contained in the Points of Claim and served along with the request for arbitration, the respondent must be careful not to respond to the points of Claim as such response may amount to 'taking steps in the proceedings' such as to lead to the loss of the right to challenge the jurisdiction of the arbitrator.<sup>53</sup> The decision of the arbitral tribunal on its jurisdiction is 'final and binding'.<sup>54</sup> The arbitral tribunal can make this decision on its jurisdiction in a preliminary award or in the final award on the merits. The final award is subject to challenge before the Lagos High Court on grounds that impact on its jurisdiction as examined below.

The LSAL helpfully makes express provision on the language of the tribunal. The official language of Nigeria (and of Lagos State) is English and most commercial contracts connected to the State will be written in the English language. Note that parties arbitrating under the LSAL may wish their arbitral reference to be conducted in another language and are empowered to agree on this.<sup>55</sup>

<sup>48</sup> See s 32 LSAL. Note that s 17 ACA uses the more definite phrase, 'received by the other party'.

<sup>49</sup> See s 19(1) LSAL and s 12(1) ACA.

<sup>50</sup> See s 12 ACA and note that s 19(2) LSAL further clarifies the application of the doctrine of separability and its effects on the arbitral reference. For more details on these doctrines, see Emilia Onyema, 'The Doctrine of Separability under Nigerian Law', AJBPCL (2009) pp 65-79.

<sup>51</sup> See s 19(3) LSAL and s 12(3) ACA.

<sup>52</sup> See s 19(3) (b) LSAL and s 12(3) of ACA.

<sup>53</sup> See ss 17-18 LSAL and s 19 ACA on Points of Claim and Points of Defence.

<sup>54</sup> See s 19(4) LSAL and s 12(4) ACA.

<sup>55</sup> S 36 LSAL and see the more elaborate provision of s 18 ACA.

The claimant is required to serve a 'Point of Claim' on the respondent who in return serves his 'Point of Defence' on the claimant.<sup>56</sup> These pleadings should state the facts relied upon to support the claim (defence or counterclaim), points in issue, relief or remedy sought and any additional relevant particulars as appropriate.<sup>57</sup> It is the responsibility of each party to ensure that whatever documents it serves on the arbitral tribunal, the same is served on the other party.<sup>58</sup> Where the document emanates from the arbitral tribunal then the onus is on the tribunal to ensure that all the parties are served.<sup>59</sup>

In the absence of agreement by the parties, the arbitral tribunal shall determine the place of arbitration, the date (reference to hearing dates), and time (for taking various steps in the proceeding).<sup>60</sup> In arbitral practice, the arbitrator will agree these and other relevant administrative issues with the parties at the preliminary meeting or hearing. The agreed terms from such meeting are contained in a preliminary order or notice. This order or notice guides all parties as to the conduct of the arbitration. It is important to note that this provision does not refer to the juridical seat of arbitration<sup>61</sup> but to the place or venue agreed for the hearing or for any other activity of the arbitral tribunal, clarifying the domestic remit of the LSAL. An important safeguard that the arbitral tribunal is not bound to meet at the agreed venue and can conduct its activities in other places is also provided. This is particularly important in a Federation where each constituent State may have its own law on arbitration and ensures adequate flexibility for the arbitral tribunal to be guided by the location of the witnesses, evidence and convenience of the parties.<sup>62</sup>

The LSAL gives the arbitral tribunal wide powers over the arbitral process but these can be limited by the parties.<sup>63</sup> These include the tribunal's power to order the payment of a sum of money in any currency, order a party to do or refrain from doing anything,<sup>64</sup> order specific performance of a contract,<sup>65</sup> and order the rectification, setting aside or cancellation of any deed or other document.<sup>66</sup> For the effective conduct of the arbitral proceeding, the tribunal can also administer oaths or take affirmations of the parties and witnesses appearing before it, determine whether and when to hold oral hearings or proceed by documents only or combination of both, and determine the admissibility, relevance, materiality and weight to be attached to any evidence presented before it.<sup>67</sup> In addition, the tribunal can dismiss the arbitral claim in certain circumstances. These are where there has been 'inordinate and inexcusable delay' by the claimant in pursuing the

<sup>56</sup> These documents are also served on the arbitral tribunal in adequate copies for each arbitrator and possibly a tribunal secretary.

<sup>57</sup> See s 37 LSAL and s 56 ACA.

<sup>58</sup> See for example s 39(3) LSAL.

<sup>59</sup> See s 39(3)(4) LSAL and the parties should be served at the same time. See also s 20 ACA.

<sup>60</sup> See s 33 LSAL.

<sup>61</sup> On the basis of s 2 LSAL this will be Lagos State.

<sup>62</sup> See s 33(2) LSAL. This in effect protects an arbitral reference with seat in Lagos state but hearing in Abeokuta (Ogun State) for example. The fact that the place of hearing is in another State will not affect the application of the LSAL or the jurisdiction of the Lagos High Court over the reference.

<sup>63</sup> See s 38(1) and s 38(2) (a) LSAL.

<sup>64</sup> The act ordered must comply with Nigerian law and public policy.

<sup>65</sup> Note that though the LSAL applies to an arbitration agreement pursuant to a legal relationship 'whether contractual or not' according to s 3(1), the power to order specific performance is limited to contracts.

<sup>66</sup> See s 38(2) LSAL.

<sup>67</sup> See s 39 and s 31 LSAL. Arbitrators enjoy the same powers under the ACA.

claim. Such delay however must in addition, give rise or be likely to give rise to, 'a substantial risk that a fair resolution of the issues ... will not be possible', or has caused or will cause 'serious prejudice' to the respondent.<sup>68</sup> The tribunal also has powers to award simple or compound interest on any sum, from such dates and at such rates the tribunal considers just.<sup>69</sup> Since the parties may withdraw any of these powers from the tribunal it is important they are aware of the endowment and make an informed choice of whether to opt out of these provisions.<sup>70</sup>

Each disputing party has a protected right to be heard. This right includes being given the opportunity to present its case and defend the allegations against it.<sup>71</sup> The LSAL makes various express provisions to ensure the observance of this fundamental right. An example is in section 34 which requires the tribunal to treat the parties equally. It is each party's responsibility to ensure it attends and is represented at any scheduled hearing of which it has been notified and present any written evidence as required. Where a party fails to attend or present evidence, the tribunal may continue with the proceedings and make an award.<sup>72</sup> The award (like any award) would be on the basis of the evidence before the tribunal. This provision emphasizes the very importance of a party putting not just its claim but evidence to prove its claims or assertions before the tribunal. It is not for the tribunal to second guess or manufacture evidence for any of the parties. The tribunal is expressly empowered to appoint expert witnesses with wide powers on the remit of these witnesses. The right of the parties to cross examine the witnesses in oral hearing is also protected.<sup>73</sup>

In addition the arbitral tribunal has to ensure a fair resolution of the dispute without unnecessary delay or expense.<sup>74</sup> Thus the arbitral tribunal must actively seek to avoid unnecessary delay and at the same time ensure the parties are heard and given a fair opportunity to present their case (and respond to the case against them). Both obligations are important and are geared towards ensuring fair hearing and safeguarding due process. There may be tension complying with both obligations, for example where a party repeatedly seeks extension of time from the arbitral tribunal, should the request be granted even where the tribunal forms the view that the application is an unnecessary delay of the proceeding. In practice, most arbitrators in protection of the enforcement of their award will opt to allow the fair hearing obligation override the 'avoid unnecessary delay' obligation. This is fair enough but the additional obligation to avoid unnecessary expense may be more difficult for the arbitral tribunal to police. It is suggested that expense in this section should refer to those items that make up the cost of the arbitration as listed in the LSAL.<sup>75</sup> Included in the lists are items such as, cost of legal representation, fees and travel expenses of parties and their witnesses. It is obvious that the arbitral tribunal would lack any control over these items. All the arbitral tribunal can

<sup>68</sup> See s 41(3) LSAL.

<sup>69</sup> See s 46 LSAL.

<sup>70</sup> The arbitrator does not enjoy a comparable power under the ACA.

<sup>71</sup> See s 34 LSAL and s 14 ACA.

<sup>72</sup> See s 41(4) LSAL but note that such failure should not prejudice the party.

<sup>73</sup> See s 42 LSAL and s 22(1) & (2) ACA.

<sup>74</sup> See s 34 LSAL. Under s 14 ACA the arbitrator is only required to treat the parties equally and grant them a full opportunity to present their case. There is no obligation to avoid undue delay.

<sup>75</sup> As listed under s 51(1) LSAL to include fees and expenses of the arbitral tribunal, travel and other expenses of the parties, witnesses and experts, cost of legal representation and administrative cost.

do is where such costs are sought to be recovered, to only award sums that are reasonable.

To give teeth to the powers of the tribunal over the arbitral proceeding, the LSAL empowers the tribunal to make a peremptory order in terms of any order or direction previously made but not complied with by a party.<sup>76</sup> Where the party also fails to comply with the peremptory order the tribunal may direct such party not to rely on any material or allegation, the subject matter of the order; draw such adverse inference as the circumstance justify; base its award only on materials properly produced before it; and make relevant orders as to cost against the defaulting party.<sup>77</sup> This is a very important section as it gives the arbitral tribunal additional powers to assist it in its obligation of ensuring a fair resolution of the dispute without unnecessary delay and expense.<sup>78</sup>

On decision making by the tribunal, the LSAL empowers the parties (or co-arbitrators) to authorise the presiding arbitrator to decide procedural issues. This is an exception to the provision that any decision must be by a majority of the tribunal.<sup>79</sup> This of course only applies where the arbitral tribunal is composed of more than one arbitrator. The arbitral award however must be made by a majority and a reason as to the absence of the signature of the dissenting arbitrator will suffice.<sup>80</sup> After delivering the award to the parties, the arbitral tribunal is empowered to correct,<sup>81</sup> interpret<sup>82</sup> and make additional award,<sup>83</sup> at the request of one of the parties within clearly defined time periods.<sup>84</sup>

Parties can settle their dispute even after they have commenced arbitration under the LSAL. However the LSAL does not require arbitrators to actively encourage the parties to settle. The generally accepted practice is that disputing parties can reach a settlement of their dispute at any time before the arbitral tribunal publishes its final award. However section 45 LSAL limits this right to 'during the arbitral proceedings'.<sup>85</sup> This may imply that once proceedings are concluded, parties are precluded from reaching a settlement. The pro-ADR atmosphere currently pervading dispute resolution in Nigeria makes such a conclusion doubtful. The limitation in section 45 however creates the need to define when the arbitral proceedings come to a close since it raises the question whether, in the period between the closure of arbitral hearings and publication of the award by the arbitral tribunal the parties can enter into a settlement over their dispute. This is especially important if the parties wish for their settlement terms to be

<sup>76</sup> The ACA does not contain such a provision.

<sup>77</sup> See s 41(7) LSAL.

<sup>78</sup> In accordance with s 1(a) LSAL.

<sup>79</sup> See s 44 LSAL and note that the disputing parties can agree otherwise. This means that the parties can insist on a unanimous decision for example. Note that s 24 ACA makes provisions to the same effect.

<sup>80</sup> See s 47(2) LSAL.

<sup>81</sup> See s 50(1) (a) LSAL to correct computational, clerical, typographical or similar errors in the award. This correction can also be made by the arbitral tribunal on its own volition in accordance with s 50(1) (3) LSAL.

<sup>82</sup> See s 50(1) (b) LSAL to interpret a specific point or part of the award.

<sup>83</sup> See s 50(4) LSAL and should be on claims made in the arbitral reference but omitted from the award.

<sup>84</sup> Note that the parties can agree different time periods for the exercise of these powers while the arbitral tribunal can extend the time within which it will make the correction, interpretation or additional award in accordance with s 50(6) LSAL.

<sup>85</sup> See s 25 ACA to the same effect.

formulated into a consent award by the arbitral tribunal. It appears that section 45(1) will have to be given a wide interpretation to accommodate such scenario. This is especially so as the LSAL itself is geared towards parties obtaining a fair resolution of their dispute without unnecessary delay and expense. Surely a mutually agreed settlement will satisfy this objective. Some assistance with interpreting this provision can be gleaned from section 48(1) LSAL which alludes to arbitral proceedings terminating when the final award is made. It is suggested that in line with the reasoning above and this section, 'during the arbitral proceeding' will be from commencement of the arbitral reference to the time the final award is made. Such time will be the date on the said award. This interpretation will ensure the disputing parties can settle their dispute and request the arbitral tribunal to enter the terms of settlement in a consent award any time from commencement of the arbitration until the tribunal notifies the parties of the final award on the merits of the dispute. The tribunal can transcribe the agreed settlement into a consent award (or award on agreed terms) when so requested by the parties.<sup>86</sup>

The discussions above show that there are some changes between the provisions of the ACA and LSAL which bring greater clarification on the arbitral procedure. The most notable addition is the power given to the arbitrator to make peremptory orders in the LSAL.

#### 2.4 Award and grounds for setting it aside

An arbitral award made under the provisions of the LSAL must satisfy certain formal requirements. Such awards to be formally valid must be in writing and duly signed by the arbitrators.<sup>87</sup> In addition to the formal validity requirements, the award must satisfy certain substantive validity requirements.<sup>88</sup> These are that the reasons on which the decision was based are stated in the award, except the parties had dispensed with the award being reasoned, or it is a consent award; and the date and place where the award was made are also stated in it.<sup>89</sup>

Immediately the arbitral award is made, it shall be delivered (or published) to the disputing parties.<sup>90</sup> The LSAL does not expressly state who should notify the disputing parties of this fact. This may be to accommodate situations where the arbitral tribunal or its secretary, or arbitration institution so notifies the parties. A technical interpretation of the section implies that notification of the award is not the sole responsibility of the arbitral tribunal, thus creating some degree of uncertainty. However it can also be said to be a matter of arbitral practice that in ad hoc arbitration, the notification will be done

<sup>86</sup> The parties will still be bound to pay the fees of the arbitrator for time spent on drafting an award, for example.

<sup>87</sup> Note that where the award is by majority decision, the dissenting arbitrator may refuse to sign the award. As already noted this will not invalidate the award as long as the reason for the absent signature is stated on the face of the award as provided in s 47(3) (a) LSAL. See also s 26(2) ACA to the same effect.

<sup>88</sup> See s 47(3) LSAL and s 26 ACA.

<sup>89</sup> Note that the deemed place of the award is the place agreed by the parties or determined by the tribunal in accordance with s 47(3) (c) LSAL.

<sup>90</sup> See s 49(1) LSAL. There is no similar provision in the ACA. This is understandable since pursuing the reference without undue delay is not a requirement under the ACA.



by the arbitral tribunal or its secretary while under institutional references, the institution will notify the parties.<sup>91</sup>

Each party is entitled to receive one copy of the award. There appears to be nothing in the LSAL to prevent a party from demanding more than one copy of the signed award from the arbitral tribunal. However the tribunal may be minded to publish one copy to each of the parties and additional copies requested will be certified true copies which the tribunal will certify.<sup>92</sup> It is important to note that the LSAL does not require the arbitral tribunal to file or deposit a copy of the award with any other authority (for example the court) or body. It appears the LSAL envisages a two-stage process for collection of the award. The first stage is for the notifying entity to serve a notice in writing on the parties informing them that the award is ready for collection followed by the delivery of the award to the parties.<sup>93</sup> The notification stage is couched in mandatory terms so that where for example in an ad hoc reference, the arbitrator has written up his award, it is insufficient for him to send (by post, electronic mail or any other means) the award to the parties without first serving a notice on them.<sup>94</sup> It is not clear from the LSAL the consequence of such a failure by the arbitral tribunal (or institution). It is difficult to appreciate the relevance of this requirement of notice and of making it mandatory. However note that there is nothing in the LSAL that stops the arbitral tribunal sending the notice of readiness of the award and the award at the same time to the parties. Even though the LSAL expressly empowers the arbitrator to refuse to deliver up the award to the parties except on full payment of his fees and expenses,<sup>95</sup> note that the arbitrator will still be required to notify the parties of the readiness of the award since the two obligations are independent of each other.

It is trite that upon delivery of the final award and full payment of his fees and refundable expenses, the arbitrator becomes *functus officio* as his mandate effectively comes to an end. Jurisdiction over the arbitral reference transfers back to the disputing parties. It is for the party against whom the award has been made to voluntarily perform the award. Where the award is not so performed, either party can seek the assistance of the courts to set aside or enforce the award. The LSAL gives the party wishing to set aside the award three months from the date of the award (or additional award) to request the Lagos High Court to set aside the award.<sup>96</sup> It is important to note that the court has discretion on whether or not to set aside the award.<sup>97</sup> So effectively, even where one of the grounds on which the LSAL provides for an award to be set aside is proved, it is for the court to determine that it is of a standard to merit the setting aside of the award. Section 55(3) LSAL expressly states that in addition to proving the ground relied on, it must cause or have caused the applicant substantial injustice.<sup>98</sup>

<sup>91</sup> This can be inferred from s 49(7) LSAL which expressly refers to the institution delivering the award.

<sup>92</sup> See s 47(4) LSAL.

<sup>93</sup> The notification must be by written notice and so can conceivably be by electronic mail, letter, text message, fax, telex but not by telephone. The ACA in s 26(4) simply provides for delivery of the award to each party.

<sup>94</sup> Note that nothing stops the arbitral tribunal sending both the notice and award at the same time through the same medium.

<sup>95</sup> See s 49(2) LSAL which is at the discretion of the arbitrator.

<sup>96</sup> See s 55(1) LSAL and s 29 ACA.

<sup>97</sup> The provision of s 55(2) LSAL opens with 'The Court *may* ...' (emphasis added).

<sup>98</sup> Note that the ACA does not contain this safeguard which is inspired by s 68 EAA.

The Lagos High Court can make one of three orders in this connection: it can remit the award back to the tribunal in whole or in part; set the award aside in whole or in part; and render the award to be of no effect, in whole or in part.<sup>99</sup> This generally raises the question of the difference between setting aside an award and rendering the award of no effect.<sup>100</sup> It is clear that an award that has been set aside in whole has no legal effect and where a part or parts of it are set aside then those parts are of no legal effect and so unenforceable.<sup>101</sup> It appears that where the award can be remitted back to the tribunal, then that would be the preferred option to setting the award aside or declaring it of no effect.<sup>102</sup>

Before examining the grounds on which an award may be set aside under the LSAL, it must be noted that some of the grounds are similar to those listed under the ACA.<sup>103</sup> The grounds can also be categorised into those arising under the arbitration agreement, the arbitrators, the arbitral process, and under public policy.

#### Grounds arising under arbitration agreement

The award can be set aside where one of the parties to the arbitration agreement is under some incapacity.<sup>104</sup> This refers to legal capacity as a fundamental issue of formal validity of the arbitration agreement itself. The effect of this ground is that basically the arbitration agreement was fundamentally flawed and so null and void and of no legal effect. An example of such a scenario is where for example under section 54 of the Companies and Allied Matters Act (CAMA) one of the parties is not an entity duly registered under CAMA to carry on business in Nigeria.

Another ground deals with other validity requirements for the arbitration agreement under the law chosen by the parties or under Nigerian law.<sup>105</sup> This provision includes any matter that will invalidate or vitiate a contract under the chosen or Nigerian law. It has been mentioned above that the reference or allusion to foreign law in this section is misconceived. The third ground that impacts on the arbitration agreement is where the award deals with a *dispute* not contemplated or within the arbitration agreement or *matters* beyond the scope of the arbitration agreement.<sup>106</sup> To appreciate the possible problems with interpretation that may arise by the separation of these two provisions it is important to define the keywords italicised above. According to *Black's Law Dictionary*, 'dispute' refers to 'a conflict of claims or rights, the matter for which a suit is brought and upon which issue is joined...',<sup>107</sup> while 'matter' is defined as 'substantial

<sup>99</sup> See s 55(3) LSAL.

<sup>100</sup> Under the ACA, the court can set aside the award or remit it back to the tribunal, in either case, in whole or in part.

<sup>101</sup> See *Black's Law Dictionary* on definition of set aside as 'to reverse, vacate, cancel, annul, or revoke a judgment, order, etc', while no effect refers to not enforceable, not executable. See p 1372 and p 514 respectively.

<sup>102</sup> See s 55(4) LSAL.

<sup>103</sup> See ss 29-30 ACA.

<sup>104</sup> See s 55(2) (i) LSAL.

<sup>105</sup> See s 55(2) (ii) LSAL.

<sup>106</sup> See s 55(2) (iv) & (v) LSAL. It is suggested that making separate provisions on *dispute* and *matters* not falling within the arbitration agreement may create confusion and uncertainty as to whether the issue complained about is a dispute or matter. This sort of confusion is avoidable.

<sup>107</sup> *Black's Law Dictionary*, 6<sup>th</sup> edition. West, 1990, p 472.

facts forming basis of claim or defense, facts material to an issue...'.<sup>108</sup> Therefore it is suggested that the first default implies such dispute was not before the tribunal while in the second case the tribunal considered facts not put before it. In either case, it is a question of lack of jurisdiction of the arbitral tribunal conferred under the arbitration agreement but the results will be different. If the complaint falls under *matter*, and the matters are separable then those matters that fall within the scope of the arbitration agreement, will be upheld while those matters that fall outside it will be set aside. This implies a partial setting aside of the award. However if the complaint falls under *dispute* then the whole award will be set aside. Clearly the consequences of identifying whether the issue complained about is a *matter* or *dispute* can be grave. If as suggested above both imply a lack of jurisdiction on the part of the arbitral tribunal, it may have been better to leave the nature of the order to be made to the discretion of the court, so that where the issue can be separated from the rest of the award, then a partial setting aside order will be made. This can still be the practical interpretation of both sections.

There is a ground under section 55(2) (viii) LSAL which refers to the invalidity of the agreement under which the dispute arose. It appears this is a reference to the substantive contract. So where the award validates or upholds a contract (not being the arbitration agreement) which the Court determines to be invalid, non-existent or ineffective, such award may be set aside. This reference must be to the substantive contract since the validity of the arbitration agreement has been provided for under section 55(2)(ii). In interpreting and applying this section, the Court will need to be careful so as not to review the award on its merit thereby translating a setting aside application to a full appeal.

#### Grounds that affect the arbitrators

Another ground on which the arbitral award may be set aside is where the composition of the arbitral tribunal was not in accordance with the agreement of the parties.<sup>109</sup> The agreement of the parties is here limited by any relevant mandatory provision of the LSAL. A reference back to section 7 reveals that the number of arbitrators is not treated as a mandatory matter. It will be recalled that this section empowers the disputing parties to determine the number of arbitrators. The section even permits the parties to choose an even numbered tribunal.<sup>110</sup> It is important to note that this ground will fall within the waiver provision in section 58. This being the case, it appears that a breach of this ground will only occur where the applicant was not aware of the formation of the arbitral tribunal, which will also amount to a breach of the due process provision examined below.

The remaining grounds that directly affect the arbitrator are corruption of the arbitrator<sup>111</sup> and lack of qualification required under the arbitration agreement.<sup>112</sup> It is suggested that these additional two grounds will also amount to clear breaches of the

<sup>108</sup> Black's Law Dictionary. 6<sup>th</sup> edition, West, 1990, p 978.

<sup>109</sup> See s 55(2) (vi) LSAL.

<sup>110</sup> See s 7(2) LSAL.

<sup>111</sup> See s 55(2) (x) LSAL.

<sup>112</sup> See s 55(2) (xi) LSAL.

arbitration agreement.<sup>113</sup> This is moreso since the subsection expressly refers to qualification agreed in the arbitration agreement. The third additional ground is on any misconduct of the arbitrator in the course of the proceedings.<sup>114</sup> This is a very wide provision implicating technical, procedural and substantive misconduct and again most of the matters listed under these types of misconduct of the arbitrator in case law can conveniently be subsumed under some of the previous grounds.<sup>115</sup> The cumulative effect of the misconduct ground is that the grounds in the section are not exclusive but quite open ended.<sup>116</sup> This does not conform with the overriding objectives of the LSAL in section 1 and the misconduct ground should not have been included but buried for good by the Lagos State legislator.

#### Grounds arising from the arbitral process

As it relates to the conduct of the arbitral process itself, there are two grounds breach of which will make the award liable to be set aside. These are: lack of observance of due process and conducting the arbitration contrary to the agreement of the parties. The parties' fundamental right to be heard is protected in the form of each party being properly notified of the appointment of the arbitrator, the arbitral proceedings, and of being given a fair opportunity to present his case and answer the case against him.<sup>117</sup> This in effect preserves each party's right to natural justice or due process. The second ground that impacts on the arbitral process is where the arbitral procedure was not in accordance with the agreement of the parties.<sup>118</sup> Note however, that it is possible for a party to waive these rights if the party failed to raise any objection during the proceeding.<sup>119</sup> In this way the LSAL tries to prevent tactical positioning by parties where they spot lapses with the arbitral proceeding but sit it out with the intention to challenge the arbitral award on such grounds if they lose the arbitration. Parties must be aware of this possibility to tacitly consent to an irregularity so that they exercise their right to raise an objection once they become aware of such irregularity or reserve their right to challenge the award on that ground.

The remaining two grounds impact on public policy considerations and are on objective arbitrability and public policy. Note that the subject matter of the dispute must be capable of settlement under the laws of Nigeria.<sup>120</sup> This is self explanatory since it is not disputes arising from all subject matters that can be arbitrated under the laws of Nigeria. On the compliance of the award with public policy, it is suggested that this refers to the

<sup>113</sup> Where the parties were deceived by the arbitrator into thinking he has the required qualification, the arbitrator's appointment will not be in accordance with the agreement of the parties. This will also be a question of misconduct. However where the parties were aware of this lack of qualification but continued with the proceeding, then they will be deemed to have consented to this and have waived their right to complain.

<sup>114</sup> See s 55(2) (xii) LSAL and s 30 ACA.

<sup>115</sup> See for example J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi & Associates Publ, 1999, pp 275-286.

<sup>116</sup> It is debatable if this is desirable under the LSAL especially since it sacrifices certainty and modernity to adhere to some aspects of the Common law such as misconduct of the arbitrator.

<sup>117</sup> See s 55(2) (iii) LSAL.

<sup>118</sup> See s 55(2) (vi) LSAL. Note that the procedure agreed by the parties must not contravene a mandatory requirement of this law.

<sup>119</sup> See s 58 LSAL.

<sup>120</sup> See s 55(2) (ix) LSAL.

public policy of Nigeria which is ascertained through its statutory laws and decisions of the courts.<sup>121</sup>

#### Enforcement of the award

An arbitral award made in Lagos or any other state of the Federation will be recognised as binding and be enforced by the Lagos High Court on application of a party bound by the award.<sup>122</sup> It is important to note that the arbitral award becomes binding on the parties when it is made by the arbitral tribunal. The Lagos High Court will recognise its binding nature. In an arbitral award, one party will most likely be ordered to do or refrain from doing something and in majority of cases one party will be ordered to pay a sum in money to the other party. Any party involved in arbitration does not just want to get a favourable award but wants the tangible effect of the award so for example if the award was for a money sum, the party wants to receive the funds awarded to it. This can be achieved in various ways. The party against whom the award was made can voluntarily pay the award sum.<sup>123</sup> However, the world is not ideal so that in some cases, the party against whom the award was made will fail or refuse to comply with the terms of the award. The onus will then shift unto the party in whose favour the award was made to take steps to enforce the award.<sup>124</sup> To do this, the LSAL requires the applicant to seek enforcement of the award before the Lagos High Court. The conditions to fulfil are that the application must be in writing (so possibly through an originating summons/writ). In support of the application the applicant must produce the authenticated copy of the original award or a certified true copy of same, the original copy of the arbitration agreement or a certified true copy of same and pay necessary court fees.<sup>125</sup> Under the LSAL, the award can be enforced in the same manner as a judgment of the Lagos High Court.<sup>126</sup>

The judgment debtor or losing party in the award can, either actively commence an action resisting the award before the Lagos High Court, or wait for the winning party to seek recognition and enforcement of the award and then resist that action.<sup>127</sup> The Court will refuse to recognise and enforce the award on similar grounds as those on which it will set aside the award.<sup>128</sup> The first thing to note is that there is no time limit indicated for applications brought under this section.<sup>129</sup> On the grounds, the second part of section 57(2) (b) extends beyond that of subsection 55(2)(ii) to ‘... Arbitration Agreement is

<sup>121</sup> See s 55(2) (xiii) LSAL.

<sup>122</sup> This application shall be by Originating Motion in accordance with rule 7 of the Arbitration Application Rules 2009 scheduled to LSAL.

<sup>123</sup> It is assumed that most awards are voluntarily complied with. This can only be an assumption because of the private nature of the process since knowledge of the exact numbers of references is not empirically known.

<sup>124</sup> Note that the enforcement application is subject to the applicant producing the relevant documents and s 58 LSAL on waiver.

<sup>125</sup> See s 56(2) LSAL and note that if the award or arbitration agreement is not in the English language (being the language of the Lagos High Court), these will have to be translated into English for purposes of the application. See also s 31 ACA.

<sup>126</sup> See s 56(3) LSAL. Note that leave of the Court is required and this implies that the applicant can rely on the enforcement mechanism of the Lagos High Court.

<sup>127</sup> See s 57 LSAL.

<sup>128</sup> The similarity is only on s 55(2) (i), (ii) & (iii) LSAL.

<sup>129</sup> In contrast to s 55 LSAL as this section requires three months from the date of the award for setting aside applications.



not valid under the Law of the Country where the award was made'. As already argued, it is very doubtful any award made outside Nigeria sought to be enforced within Lagos State will be subject to the LSAL. Such an award will fall within Part III of the ACA or be enforced under the New York Convention pursuant to section 54 ACA. This therefore means that the section 57(2) (b) LSAL quoted above has no legal effect.

## 2.5 Termination of arbitral proceedings

The tribunal can terminate the arbitral proceeding where a claimant fails to file a Point of Claim and the respondent does not file a counterclaim.<sup>130</sup> Where the tribunal is satisfied that the claimant has delayed the proceeding and the delay will give rise to substantial risk that a fair resolution will be achieved, the tribunal may dismiss the claim.<sup>131</sup> Otherwise the arbitral proceeding terminates when the final award is made.<sup>132</sup> As mentioned above this may be the date of the award and so will by necessity precede the delivery of the award to the parties. Another date will be that of delivery or publication of the award to the parties. However such a date may be difficult to ascertain while the date on which the award is made is more certain.<sup>133</sup>

The tribunal can also terminate the arbitral proceeding through the issuance of an order. Such order will be issued where: the parties agree, the tribunal finds continuation of the proceeding unnecessary or impossible, or the claimant withdraws its claim but the respondent wishes to obtain a final settlement to the dispute. If the tribunal considers that the respondent has a legitimate interest, it shall issue an order terminating the arbitral proceeding.<sup>134</sup> The direct consequence of the termination of the arbitration proceeding is the determination of the mandate of the arbitrator.<sup>135</sup>

The arbitrator's primary right and benefit of participating in the arbitral reference is payment for his services.<sup>136</sup> This comprises his fees and refundable expenses.<sup>137</sup> The LSAL in recognition of this right empowers the arbitrator to agree fees with the disputing parties and refuse to deliver up the award until paid.<sup>138</sup> Note however, that it is the obligation of the arbitral tribunal to fix the fees of the arbitrator and other cost of the

<sup>130</sup> See s 41(1) (a) LSAL. Note that according to s 41(1), (b) & (c), where the respondent fails to file a defence to the claim, the tribunal shall continue with the proceeding. However where any party fails to appear at the hearing or produce documentary evidence, the tribunal will have a discretion on whether or not to continue with the proceeding. See also s 21 ACA for comparable provisions.

<sup>131</sup> See s 41(3) LSAL.

<sup>132</sup> Note that termination does not depend on the publication of the award to the parties.

<sup>133</sup> The difficulty lies in determining the exact date of delivery or when delivery was actually made. A very simple example is where the tribunal sends the award by post to the parties and they each receive the award on different dates. Therefore on which of the dates will the award be said to be delivered? This also raises the issue of when exactly delivery is made. So for example is it when the award was posted or when it was received? How do you prove date of receipt of the award? So to avoid these uncertainties, the date on the award is preferable.

<sup>134</sup> See s 48(2) LSAL.

<sup>135</sup> See s 49(1) LSAL and this affects each individual arbitrator since the mandate is personal to each arbitrator. See also s 27(3) ACA but note the scenarios in s 10(1) ACA on termination of the mandate of the arbitrator.

<sup>136</sup> See s 51(2) LSAL.

<sup>137</sup> See s 51(1) (a) – (c) LSAL.

<sup>138</sup> See s 49(2) LSAL.

arbitration.<sup>139</sup> Where the fees are not agreed (or the parties contest the fees) the Lagos High Court on the request of a party (on notice to the other parties and the arbitrator) can determine the fees payable to the arbitrator.<sup>140</sup> It is important to note that arbitration institutions enjoy these same rights with regards to their fees.<sup>141</sup> Finally the arbitral tribunal can request a deposit towards the costs of the arbitration from the disputing parties from commencement of the reference.<sup>142</sup> The fees payable to the arbitrators are expressly recognised under the LSAL as the primary responsibility of the disputing parties jointly and severally.<sup>143</sup> It is suggested that this also extends to the fees payable to arbitration institutions in accordance with the spirit of the law as discussed above.<sup>144</sup>

### 3. Novel Provisions in the LSAL

This section briefly examines the provisions on some issues for which no provision is made in the ACA and which in that sense are novel provisions in legislations on arbitration in Nigeria. These are the choice of substantive law (3.1), consolidation and joinder (3.2), immunity of the arbitrator (3.3) and interim measures (3.4).<sup>145</sup>

#### 3.1 Choice of substantive law

The disputing parties can choose the law or rules of law that they wish to apply to the determination of the substantive issues in dispute between them.<sup>146</sup> However, where the tribunal determines that the chosen rule of law is inappropriate or inadequate to deal with the substantive issues, even though expressly chosen by the parties such rules of law will not be applied. In effect to apply, the choice of the parties must be an effective one. In the absence of any choice (or where an inadequate choice was made) the arbitral tribunal will apply 'the law determined by the conflict of laws rules which it considers applicable'.<sup>147</sup> Note however that this formulation restricts the arbitral tribunal to the application of a *law* and not *rules of law*.<sup>148</sup> Therefore with an effective choice, parties have wider scope but not where the tribunal determines the applicable law. This provision expands the choice parties can make to include rules of law. Note that the reference to conflict of law test is an internal conflict. This is where the transaction implicates the application of the laws of more than one state of the federation. It does not implicate the laws of a foreign country which will make the transaction international

<sup>139</sup> See s 51(1) LSAL and these costs include the fees and related expenses of each arbitrator, cost of experts and other tribunal assistance (such as tribunal secretary, transcribers and stenographer), travel and other expense of the parties and their witnesses, claimed reasonable legal costs of the successful party, and administrative costs.

<sup>140</sup> See s 49(3) LSAL in relation to the arbitrator withholding the award for lack of payment of his fees and expenses which should also apply even where the arbitrator does not exercise his right to withholding the award.

<sup>141</sup> See s 49(7) LSAL.

<sup>142</sup> See s 52 LSAL and note that this should also apply to arbitration institutions and supplementary deposits can be requested at various stages of the reference.

<sup>143</sup> See s 54 LSAL.

<sup>144</sup> The ACA makes provisions on cost in s 49 for international arbitration and arts 38-40 of the scheduled Arbitration Rules.

<sup>145</sup> The ACA makes a basic and very general provision on interim measures.

<sup>146</sup> See s 20 LSAL. Note that the reference in s 20(2) to a given jurisdiction or territory and its conflict of laws rules, as argued above are ineffective if they refer to another sovereign state.

<sup>147</sup> See s 20(3) LSAL.

<sup>148</sup> The issue on whether this provision is relevant considering that the LSAL jurisdiction is over domestic arbitration is discussed above.

and so outside the scope of the LSAL as argued above. There is a further obligation on the arbitral tribunal to decide the dispute in justice and in good faith.<sup>149</sup> The tribunal is also obligated to decide in accordance with the terms of the contract and take account of any applicable trade usages.<sup>150</sup>

### 3.2 Consolidation of disputes and joinder of parties

These are new issues. The disputing parties can agree the consolidation of the arbitral reference with other arbitral proceedings and the terms of any concurrent hearings.<sup>151</sup> The impressive aspect of this provision is the fact that parties do not have to agree on these issues in their arbitration agreement but as the need arises during the arbitral reference. It is important to note the caveat giving the arbitral tribunal the power to strike down such agreement of the parties where the tribunal is of the view that it is not in the interest of justice to so order.<sup>152</sup> Further, the law makes provision for third party joinder. All that the third party (so non-party to the arbitration agreement) need do is make an application for joinder to the arbitral tribunal with the consent of the disputing parties.<sup>153</sup> This requirement of consent of the disputing parties preserves the contractual nature of the arbitration process since as a question of privity, the parties to the arbitration agreement need to give their consent to any consolidation or joinder request. However it is worrying that the right is bestowed on the third party and not on the parties directly, and without any condition such as the reference affecting the rights of the third party. The section also leaves open the question whether a disputing party can seek to join a third party. Section 40 gives the parties right to agree on these provisions so the parties can limit or vary such powers if they wish either in their arbitration agreement or after the commencing the arbitration.

### 3.3 Immunity of arbitrator

Another new issue is the immunity of the arbitrator. All arbitrators sitting in Lagos State and under the LSAL will enjoy limited immunity. Such arbitrator shall not be liable for any act or omission done in the discharge or purported discharge of his functions as arbitrator except if done in bad faith.<sup>154</sup> It is particularly commendable that the LSAL makes express provision on this issue and further extends this partial immunity to the employees and agents (pursuant to the arbitral reference) of the arbitrator. This ensures that the arbitrator does not incur liability vicariously or under the principles of agency (as principal). Since either of these forms of liability will amount to a back-door means of holding the arbitrator responsible for the act or omission of such employees and agents.

<sup>149</sup> Note that this requirement is not included in any part of the ACA.

<sup>150</sup> Note that under s 22(3) & (4) ACA, reference is made to the tribunal's power to decide *ex aequo et bono* only on the express authority of the parties and that the tribunal shall decide in accordance with the terms of the contract and take any relevant trade usages into account. No reference is made to the determination of the substantive choice of law. This is understandable since in domestic arbitration Nigerian law will apply. A detailed provision on choice of law for international arbitration is contained in s 47 ACA.

<sup>151</sup> See s 40 LSAL. There is no comparable provision in the ACA.

<sup>152</sup> See s 40(2) LSAL.

<sup>153</sup> See s 40(3) LSAL. There is no comparable provision in the ACA.

<sup>154</sup> See s 18 LSAL. Note that s 18(3) preserve any liability incurred by the arbitrator as a result of his resignation. Such liabilities usually will be in the form of refund of any monies paid for which work had not been done as agreed with the parties. The ACA does not make any provisions on the immunity of the arbitrator so that effectively the common law will apply where the issue arises.

### 3.4 Interim Measures

The ACA empowers the parties to request and the arbitral tribunal to grant interim measures of protection the tribunal may consider necessary in respect of the subject matter<sup>155</sup> but the LSAL contains more detailed provisions on interim measures and the enforcement of such measures. The LSAL helpfully defines interim measures as:

any temporary measure ... to maintain or restore the status quo ... take an action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the subject matter of the dispute or the arbitral process itself... preserving assets ... preserve evidence.<sup>156</sup>

As already mentioned power to grant interim measures is reposed in the Lagos High Court. The arbitral tribunal also has powers to grant interim measures at the discretion of the parties.<sup>157</sup> So both the court and tribunal have concurrent jurisdiction on this issue. In addition, the parties can agree that the arbitral tribunal at the application of one party can order the other party not to frustrate the purpose of the interim measure at the same time the measure is requested. This new power is geared towards giving teeth to the interim order made by the tribunal. However, it is arguably just another order which the responding party may equally decide to ignore. There is nothing coercive in the order itself so its relevance is doubtful. This is especially so since the LSAL envisages that an application would already have been made to the tribunal for a grant of interim measures. The bite of this request for a non-frustration order lies in the fact that it can be made *ex parte* before the service or hearing of the substantive application for the grant of interim measure. Thus this order will be granted and served upon the respondent at the same time as the application for the interim measures.<sup>158</sup> The *ex parte* application may unduly prejudice the respondent and may impinge on due process and his right to fair hearing which is a cardinal principle in arbitration.<sup>159</sup> To ameliorate the possible hardship against the responding party the LSAL predicates the grant of the Preliminary Order on full disclosure by the party seeking the order,<sup>160</sup> and provides for the Order to expire after 20 days from the date it was issued by the tribunal.<sup>161</sup> Moreover the arbitral tribunal is empowered to make this order 'if it considers that prior disclosure of the (application) for interim measure risks frustrating the purpose of the measure'.<sup>162</sup> Clearly the Lagos state legislator has tried to implement parts of the amended article 17 of the UNCITRAL Model Law on interim measures. The right to make an *ex parte* application in a private process which relies heavily on equal treatment of the parties and transparency is yet to be tested in other jurisdictions and so it will be interesting to see how tribunals interpret and apply the section and the response of national courts.

<sup>155</sup> See s 13 ACA.

<sup>156</sup> See s 21(3) LSAL. This definition applies to the arbitral tribunal while the High Court can grant any interim measure it can under its ordinary jurisdiction under general law grant.

<sup>157</sup> See s 21 LSAL.

<sup>158</sup> See s 24(1) LSAL.

<sup>159</sup> See s 24(2), (3), (5) LSAL.

<sup>160</sup> See s 27 LSAL and note the cost implications under s 28 LSAL.

<sup>161</sup> See s 24(4) LSAL.

<sup>162</sup> See s 23(2) LSAL. Note that the arbitral tribunal is empowered to extend, modify, suspend or terminate the interim measures or preliminary order in accordance with s 25 LSAL.

The section restates the classic common law guidance on conditions for granting interim measures of protection by a court.<sup>163</sup> These are irreparable harm, balance of convenience, evidence of serious issue to be tried, provision for security for costs.<sup>164</sup> An interim measure granted by the arbitral tribunal is enforceable by the Lagos High Court in support of the arbitral tribunal and in aid to the disputing parties.<sup>165</sup> It remains the responsibility of the party in whose favour the interim measure is granted to notify the court where the award is terminated, suspended or modified.<sup>166</sup>

The LSAL also makes provisions for the recognition and enforcement of the award on interim measures. The party against whom the award was made can also challenge the award. The enforcement of the award may be refused where the party against whom it was made convinces the Lagos High Court of the existence of issues similar to those required for the challenge of the final award, or security was not provided as required by the arbitral tribunal and where the interim measure has come to an end through termination or suspension.<sup>167</sup> The Lagos High Court is further empowered to refuse enforcement of the award where the 'interim measure is incompatible with the powers of the Court'. Alternatively the Court may 'reformulate the interim measures to adapt it to its own powers and proceedings for the purpose of enforcing and without modifying its substance'.<sup>168</sup> These provisions raise a few issues for consideration, for example, where the measure is incompatible with the powers of the Court then of course the Court lacks jurisdiction to enforce it. Should the Court not therefore decline jurisdiction and remit it back to the arbitral tribunal? If the Court decides to reformulate the award, then it runs the risk of the award no longer being the 'decision of the arbitral tribunal' but that of the Court. This is so even though the section expressly stipulates that the substance of the order must not be modified. In this situation, it is difficult to see the jurisdictional basis on which the Court will purport to act. Clearly the arbitrator can hardly be said to have made the award on interim measures if it is 'reformulated' by the enforcing Court to give that Court jurisdiction to act within its constitutional powers. This default is not cured by the addition of the words '... without modifying its substance' to the section. This is because it will usually be the substance of the award (as opposed to technical issues) that will fail the 'compatible with the powers of the Court' test. The other problem with this section is the fact that an award on interim measures is at best an interim order. It is not the final determination of the issues in dispute between the parties and the order can be varied (as clearly provided in LSAL). This raises the question why, as an interim order of the tribunal, the LSAL refers to the decision as an award and provides for its enforcement and setting aside. It may be more

<sup>163</sup> See for example "The Angelic Grace" [1995] 1 Lloyd's Rep 87

<sup>164</sup> See on security for costs s 26 LSAL. Note that where the arbitral tribunal does not require such security, the Lagos High Court may require it when it is requested to recognise and enforce the award on interim measures in accordance with s 29(3) LSAL. The Court can also require security where the award affects the interest of a third party. This the Court can do since it has a wider personal jurisdiction than the parties.

<sup>165</sup> See s 29(1) LSAL. Though not explicitly stated in the section, the award on interim measures is binding on the parties to the arbitration. This is based on the contractual nature of the process of arbitration.

<sup>166</sup> See s 29(2) LSAL.

<sup>167</sup> See s 30 LSAL.

<sup>168</sup> See s 30(1) (b) LSAL.



expeditious to provide for a party seeking enforcement of the tribunal's order granting a request for interim measures to approach the Lagos courts for such assistance without the need for the provision of an elaborate mechanism for its enforcement or setting aside as is currently provided for in LSAL.

This is the most striking of the novel provisions of the LSAL and though commendable, looks like a fertile ground for litigation before the courts. It is important that if a tribunal is empowered to grant interim measures, a practical method of enforcing such measures is also provided to make the power effective. However, in making such provision due regard must be given to the very nature of arbitration as a private process and its innate limitations and the assistance courts can render to the process. The very nature of arbitration makes provisions on *ex parte* applications open to abuse. It is true that in certain cases the order sought may be very urgent and there is the need for surprise. However it is in such situations that the courts can effectively compliment the arbitral process through rendering assistance so that a party in need of an urgent order with an element of surprise should approach the courts for such orders and not the arbitral tribunal.

#### Conclusion

This critique has examined the relationship between the ACA and LSAL which is especially important in international arbitration references with seat in Lagos state or where enforcement of a foreign arbitral award is sought before the Lagos High Court. It has argued that the ACA still retains relevance especially in situations where there is a foreign element to the arbitral reference.

There are several provisions on the arbitration agreement, arbitrators, arbitral procedure and awards where both legal regimes complement each other with little or no inconsistency but the LSAL as a more modern statute, bring much needed clarity to the law and fills gaps left in the ACA. There are also some new provisions which may be contentious and may possibly keep the Lagos High Courts busy for some time. The LSAL upholds the principle of party autonomy and strives to create a balance between the powers of the arbitral tribunal and role of the courts to assist all arbitrations subject to the LSAL. On this basis parties will be well advised to examine the LSAL before drafting their arbitration agreements and in choosing the appropriate arbitration rules.